United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,

Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY TO THE BRIEF OF MGO CORP. AND MONTICELLO GAS & OIL CO., INC.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7121

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

v.

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY TO THE BRIEF OF MGO CORP. AND MONTICELLO GAS & OIL CO., INC.

Preliminary Statement

This brief for the appellant Cities Service Oil Company (hereinafter "Cities Service") is made in reply to the Brief of the Third-Party Defendant-Appellee MGO

Corp. and Monticello Gas & Oil Co., Inc. (hereinafter collectively referred to as "MGO").

Reply Statement of the Case

Prior to Cities Service's presentation of its case against MGO and, indeed, prior to the completion of proof in the case of plaintiff against Cities Service, MGO obtained a dismissal of Cities Service's third-party complaint upon its argument that the New York General Obligations Law, §5-321, precluded enforcement of the indemnification agreement pleaded by Cities Service against MGO, (A-1088/8-A-1093/32) and that there could not be common law indemnification. (A-1093/25-A-1096/4). The dismissal of the third-party complaint was expressly based on a finding of invalidity of the indemnity agreement by reason of New York General Obligations Law, §5-321, as well as a finding, as a matter of law, that Cities Service was not entitled to common law indemnification against MGO. (A-1106/24-A-1107/9). On this appeal Cities Service argued in its main brief (Br. at 31-40),[1] that the court below erred in dismissing the third-party claim because recovery under the indemnification agreement was not barred in this case by the General Obligations Law. MGO, by its total lack of response to this point, has now conceded the point and abandoned its argument based upon New York General Obligations Law, §5-321. Furthermore, MGO's brief is also

1. "Br." references are to Cities Service's main brief. Appellees' briefs are designated by references "MGO Br." or "Doralee Br."

silent as to Cities Service's arguments and authorities on the issue of the court's erroneous dismissal of Cities Service's claim for common law indemnification.[2]

What MGO does argue in its brief is either (1) untenable on the law or facts of this case or (2) an issue raised for the very first time on this appeal.

MGO argues in Point I of its brief for the first time in this case that the stipulation of settlement of the prior action[3] superseded the 1969 lease agreement between MGO and Cities Service which contains the indemnification agreement at issue. Cities Service argues that this claim of novation is without merit. It was neither urged at trial, nor pleaded. The proof and law in this case do not support MGO's new argument. Cities Service argues infra, that the 1969 lease was between MGO and Cities Service who occupied adverse or arms-length positions in relation to each other, whereas the stipulation of settlement was between Doralee Estates, Inc. (herein-

2. Cities Service's argument with respect to MGO's abandonment of its General Obligations Law claim is discussed at Point I infra. The argument with respect to common law indemnification is set forth at Point II, infra.

3. Wherein Doralee Estates, Inc., sued MGO and Cities Service as co-defendants. This prior action, commenced in New York State Supreme Court, Sullivan County, was settled in 1972. The Stipulation of Settlement of that action appears at E-82-E-84 of the Exhibit Volume of the Joint Appendix. The lease agreement in question was made between MGO and Cities Service in 1969. It appears at page E-104-E-109 in the Exhibit Volume herein. Doralee Estates, Inc. was, of course, not a party to the lease.

after "Doralee"), on the one hand, and MGO and Cities Service, on the other hand. The stipulation of settlement on its face did not deal with any controversy between MGO and Cities Service. Rather, MGO and Cities Service were co-parties on one side of the stipulation making a common agreement with Doralee on th other side and making no agreement as between themselves. Doralee was not a party to the 1969 lease agreement. The stipulation of settlement settled no differences between Cities Service and MGO - only differences between them collectively, and Doralee. This argument is dealt with below at Point III of this brief.

As previously mentioned, all of MGO's arguments on this appeal have been raised here for the very first time. Cities Service, in this reply brief, has, therefore, combined its discussion of MGO's Points II, III and IV. Cities Service argues herein that none of these points is properly made on this appeal because each of them is based, by retrojection, on a jury verdict which was entered long after MGO was dismissed as a party.[4] Assuming, arguendo, that these points may be raised for the first time at this stage of the proceedings, Cities Service demonstrates that each of the arguments has no merit. Cities Service makes the foregoing argument in Point IV of this brief.

4. After MGO's dismissal, at least three witnesses testified either on Cities Service's behalf or in rebuttal for Doralee.

MGO argues in its Point II that Cities Service's liability, as established in this case, was not covered by the language of the lease indemnification. In reply, Cities Service argues that the indemnification clause imposes liability on MGO on its own admission that only MGO used the property and that only its actions resulted in the alleged damage to Doralee.

In a somewhat similar vein, MGO argues in its Point III that liability, as determined below rests only upon the "intentional acts" of Cities Service and that, therefore, the indemnification agreement does not afford Cities Service a claim against MGO. Cities Service replies herein that the foregoing argument clearly begs the question because the dismissal of Cities Service's claim against MGO, having occurred before the close of the proof, does not take into consideration matters of proof, but only matters of law. The law is clear that the indemnification clause would be effective as to liability to third-parties resulting from acts of Cities Service. Nonetheless, the proof showed that Cities Service committed no acts.

MGO argues in its brief at Point IV that indemnification should be barred here because public policy disallows indemnification for one's own "intentional, deliberate, malicious and illegal acts." MGO's argument on this score begs the question just as its prior argument. The dismissal, having

been on the law before the close of the case, was not based on any finding of fact. Futhermore, the argument is wrong legally. MGO's own cited authorities support Cities Service's, rather than MGO's, position.

In Point V of its brief, MGO argues, again for the very first time in this litigation, that the 1969 lease agreement between MGO and Cities Service - which includes the indemnification relied upon by Cities Service herein - constituted an unconscionable "contract of adhesion." There is absolutely no evidence in the case supportive of MGO's position even if evidence could be considered on a dismissal granted before the close of the proof and upon a different legal ground. Moreover, the 1969 lease is, on its face, a negotiated agreement.

Reply Statement of Facts

Cities Service makes this Reply Statement of Facts to augment, correct and amplify some of the statements made by MGO in its brief.

On page 3 of the MGO brief, MGO states that:

> Plaintiff's [sic] third-party complaint did not seek indemnification under any theory of common law indemnification.

MGO Br. at 3. This statement is true; however, it omits the fact that at trial a motion by Cities Service to amend the

pleadings to include a claim for common-law indemnification was made and granted by the court. (A-1096/9-16).

At page 3 of its brief MGO states that liability in the instant case was placed upon "...Cities Service for its own intentional, deliberate, malicious and illegal acts." Thus, MGO argues, Cities Service cannot be indemnified because indemnification would only be proper only for MGO's acts. MGO entirely misreads - and therefore misrepresents - the court's charge to the jury in this respect. With regard to each of the causes of action at question herein, the court clearly - albeit, Cities Service contends, erroneously - instructed the jury that they could hold Cities Service liable for either its mere awareness or knowledge of conduct of others resulting in damage to Doralee or for its "omissions". (A-1267/8-16; A-1268/4-20; A-1269/8-16; A-1270/18-22; A-1273/23-A-1274/9; A-1276/4-8; and, A-1285/23-A-1286/21). Moreover, it is well established that an agreement to indemnify against liability to third parties even for the indemnitee's own acts, is binding. Levine v. Shell Oil Company, 28 N.Y.2d 205, 321 N.Y.S. 2d 81, 269 N.E. 2d 799 (1971).

With regard to MGO's assertion (MGO Br. at 5) that Cities Service's claim for common law indemnification was left by the judge to "...be pursued in the future...," it is necessary only to mention that a claim for common law indemnification and a claim for contribution under Dole v. Dow Chemi-

cal Co., 30 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (1972) are distinctly different matters. Rather, Cities Service's claim of common law indemnity was dismissed by Judge Owen who said:

> Mr. Grubbs [MGO's trial counsel] has moved to dismiss your claim over [Cities Service's claims] against his client. I grant that motion. I do not find that there is a common law right of indemnity here, such as you speak of.

(A-1106/24-A-1107/3). To clarify and correct an error made by Cities Service in its main brief, Cities Service concedes that the footnote at page 40 of the main brief which deals with the date of decision of Dole v. Dow Chemical Co., supra, was in error and Cities Service withdraws the footnote.

MGO's brief refers frequently to Cities Service's "acts" and "conduct" resulting in the spillage of oil. The dismissal of the third party complaint was made solely on the law, prior to the close of the evidence, and without reference to any facts or finding with respect therto. Moreover, the record is devoid of proof of such "acts" or "conduct".

ARGUMENT

Summary of the Argument

Cities Service argues in this reply brief that, by silence, MGO has conceded Cities Service's argument that the grounds of dismissal urged below and accepted by the court,

for dismissal of the third-party claims for contractual and common law indemnification were legally insufficent. Also, in pointing out that all five of MGO's appeal points are raised on appeal for the first time in this litigation, Cities Service argues that (1) there is no merit to MGO's claim of novation, (2) MGO's points II, III and IV, while without merit, are nonetheless improperly raised on this appeal because Cities Service's claims against MGO were dismissed solely on legal grounds prior to verdict, and (3) MGO's argument that the 1969 lease agreement was an unconscicnable "contract of adhesion" is, aside from never before raised, without merit.

I

MGO DOES NOT ARGUE IN SUPPORT OF THE BASES ON WHICH THE COURT DISMISSED THE THIRD PARTY COMPLAINT AND, CONSEQUENTLY, BY CLEAR IMPLICATION, HAS ADMITTED THAT THE DISMISSAL WAS ERRONEOUS. THE RECENT HOGELAND DECISION OF THE NEW YORK COURT OF APPEALS CONCLUSIVELY SHOWS THE ERROR OF THE DISMISSAL.

Cities Service's Third Party Complaint alleged that pursuant to the 1969 lease agreement MGO had agreed to:

> ...defend, indemnify and save harmless [Cities Service] from any and all claims, demands, suits, actions, judgments and recovery for or on account of damage or injury (including death) to property ... any other person, firm or corporation, caused by or due to the condition or use of said premises or the streets or roads on which they abut.

(E-105, ¶8). At the trial, prior to presentation of Cities Service's case against MGO, MGO moved to dismiss Cities Service's third party complaint against it. The dismissal motion was based solely upon MGO's argument that indemnification was barred by the proscription of the New York General Obligations Law, §5-321. (A-1079-A-1102). At that time, and in Point II (page 31 through 40) of the Brief for Appellant, Cities Service argued that New York General Obligations Law, §5-321, operates only to bar a lessor from exonerating himself from liability for damage resulting from his own acts vis-a-vis his lessee, and not to bar indemnification of the lessor where, as here, liability is asserted by a third person against the lessor. In this later instance, it is clear that New York General Obligations Law, §5-321, does not bar indemnification, although the court below erroneously determined that it did. See, Hogeland v. Sibley, Lindsay & Curr Co., ___ N.Y. 2d ____ (Ct. App. No. 240, decided 6/16/77).

Strangely, MGO has set forth totally new, and unsupportable, positions in its brief on appeal. These new arguments are discussed throughout this reply brief, but it is important to note at the outset that the sole basis of the District Court's dismissal of Cities Service's third party complaint has been abandoned by MGO on this appeal.

II

MGO, BY SILENCE, HAS CONCEDED CITIES SERVICE'S CLAIM FOR COMMON LAW INDEMNIFICATION

The court below granted Cities Service's motion to amend its third-party complaint against MGO. (A-1096/9-16). This amendment added a claim of common law indemnification by Cities Service against MGO. The court granted MGO's motion to dismiss this claim. (A-1106/24-A-1107/3). Cities Service argued in its main brief that its right to common law indemnification was erroneously dismissed. (Br. at 31-40). MGO in its brief failed totally to address this issue. It must be assumed that by its silence, MGO concedes the error.

III

THE CLAIM OF NOVATION MADE IN POINT I OF MGO'S BRIEF WAS NEITHER PLEADED NOR URGED AT TRIAL AND THERE IS NOTHING TO SUPPORT IT.

In Point I of its Brief, MGO argues that the stipulation of settlement executed by Doralee, Cities Service and MGO in April, 1972, in the Sullivan County Supreme Court constituted an agreement which superseded the 1969 lease agreement between Cities Service and MGO. In so arguing, MGO totally ignores the plain fact that the stipulation of settlement was an agreement between Doralee, on the one hand and Cities Service and MGO, as co-defendants, on the other hand.

In no way did that stipulation of settlement constitute a "superseding" agreement between Cities Service and MGO. The legal predicate for such a conclusion was missing - there was no preexisting controversy or conflict between MGO and Cities Service. 8 N.Y. Jur., Compromise and Settlement, §1. Nor did the stipulation in terms mention, or relate in any way to, the lease agreement between MGO and Cities Service.

The cases cited by MGO at pages 20 through 24 of its brief are wholly inapplicable.[5] The facts of those cases indicate that the agreement or controversy which was superseded by a settlement or compromise was one between the same parties as were originally parties in the lawsuit. In each case the superseding settlement was between the plaintiff and the defendant of a pending lawsuit or prior controversy; and in no case was it between co-defendants who had made no agreement between each other. Furthermore, MGO's reliance upon 15A Am. Jur. 2d, Compromise and Settlement, §24 is misplaced in that none of the preconditions for this stated rule of law

5. Moers v. Moers, 229 N.Y. 294, 128 N.E. 202 (1920); Goldbard v. Empire State Mutual Life Insurance Co., 5 App. Div. 2d 230, 171 N.Y.S. 2d 194 (1st Dep't 1958); Langlois v. Langlois, 5 App. Div. 2d 75, 169 N.Y.S. 2d 170 (3rd Dep't 1957) and cases cited therein; Hansen v. Storm, 7 App. Div. 2d 989, 183 N.Y.S. 2d 967 (1st Dep't 1959); Blair & Co. v. Otto, 5 App. Div. 2d 276, 171 N.Y.S. 2d 203 (1st Dep't 1958); Putnam v. Otsego Mutual Fire Insurance Company, 45 App. Div. 2d 556, 360 N.Y.S. 2d 330 (3d Dep't 1974); Ressler v. Druck, 40 Misc. 2d 654, 243 N.Y.S. 2d 552 (S. Ct. 1963); and, 15A Am. Jur. 2d, Compromise and Settlement, §24.

exist in this case. The antecedent claim which was extinguished by the compromise and settlement was between Doralee, on the one hand, and MGO and Cities Service, on the other hand. 8 N.Y. Jur., Compromise and Settlement, §1, supra.

Moers v. Moers, supra, Langlois v. Langlois, supra, Blair & Co. v. Otto, supra, and Goldbard v. Empire State Mutual Life Insurance Co., supra, stand, simply, for the proposition that novation is a question of fact - the court must determine the intention of the parties. Ressler v. Druck, supra, stands for the proposition that a stipulation of settlement is a contract. Putnam v. Otsego Mutual Fire Insurance Company, supra, stands for the proposition that a settlement agreement supersedes the prior agreement or controversy to which it relates. And Hansen v. Storm, supra, a one paragraph, per curiam opinion, devoid of any reported facts, stands solely for the obvious proposition that the settlement of a lawsuit is an effective disposition of its merits. None of these cases supports MGO's contention that the prior settlement affected the lease under which MGO continued to hold the premises. Moreover, the claim of novation asserted by MGO is based on the proof in the case - still incomplete at the time the motion to dismiss was granted - whereas the motion was made and based solely on the law.

In relation to MGO's Point I, MGO also cites Putnam v. Stout, 38 N.Y. 2d 607, 381 N.Y.S. 2d 848, 345 N.E.2d 319

(1976), which stands for the proposition - wholly inapplicable to the facts of the instant case - that a lessor may be held liable for injuries to persons on the land where the lessor has breached his covenant to repair. The New York Court of Appeals holding in Putnam v. Stout, supra, was no more than:

> ...that a Landlord may be liable for for injuries to persons coming onto his land with the consent of the lessee solely on the basis of his contract or covenant to keep the premises in repair.

Id. at 618, 381 N.Y.S.2d at 854, 345 N.E. 2d at 326. In the instant caes, no injuries to persons coming onto Cities Service's land were alleged. Nor was there any covenant to repair to be found in the lease agreement between Cities Service and MGO. Thus, Putnam v. Stout, supra, does not in any way apply to the facts here. MGO's attempt to criticize Cities Service's counsel because of failure "...to inform this court that Cullings v. Goetz[256 N.Y. 287, 176 N.E. 397 (1931)] (and, hence, Dick [v. Sunbright Steam Lanudry, 307 N.Y. 422, 121 N.E.2d 399 (1954)]) was overruled last year...," is unwarranted. Cullings v. Goetz, supra, stands for a number of propositions, one of which is that "liability in tort is an incident of occupation and control...." Id. at 290, 176 N.E. at 398, citing, Restatement (1st), Torts, §227. The portion of Cullings v. Goetz, supra which was

overruled by Putnam v. Stout, supra, was clearly not the foregoing proposition which is the basis of Dick v. Sunbright Steam Laundry, supra. Rather the portion of Cullings v. Goetz, supra overruled by Putnam v. Stout, supra, was specifically limited to the factual situation set forth above, i.e., where injury occurs on the lessor's premises and where there is a covenant to repair. To the extent, furthermore, that Putnam v. Stout, supra, is based on any prior authority, it is based upon the Restatement 2d, Torts, particularly sections 355, 356 and 357 which deal with the fact situation which has just been described. However, where, as here, the injury is off of the landlord's premises and to a third party, Restatement 2d, Torts, 379A applies:

> §379A. Activities After Lessor Transfers Possession
>
> A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfer possession if, but only if,
>
> (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and
>
> (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement 2d, Torts, §379A.[6] An entirely different standard is applied here. Since MGO alone operated, and failed to unclog, the oil separtor herein, Cities Service had no liability under the above-stated rule. It did not consent at

6. The following Comment and Illustrations to Restatement 2d, Torts, §379A demonstrates why Cities Service is not liable here:

Comment:

...

c. The lessor is not liable for activities to which he does not consent, and which he does not and should not contemplate. Likewise, if the unreasonable risk is not a necessary consequence of the contemplated activities of the lessee, and such activities could normally be conducted without creating the unreasonable danger to those outside of the land by taking precautions, the lessor is not liable unless he knows or has reason to know that the lessee intends to carry on the activity without taking precautions.

Illustrations:

1. A leases land to B for use as a baseball park. At the time of the lease A knows that there is an unreasonable risk that in the ordinary course of a baseball game balls will be hit into the public highway in a manner dangerous to those using it. After B enters into possession, and in the course of a baseball game, a ball is hit into the highway, crashes into the windshield of an automobile, and injures C, the driver. A is subject to liability to C.

2. Under the same facts as in Illustration 1, if at the time of the lease the baseball field is so laid out that there is no risk that balls will be hit into the highway, and B subsequently moves the baseball diamong to a point where there is an unreasonable risk, A is not liable to C. (emphasis added).

the time of leasing to such operational oversights by MGO nor did it have any occasion to believe that MGO would be guilty of such oversights.

IV

THE ARGUMENTS MADE IN POINTS II, III AND IV OF MGO'S BRIEF WERE NOT, AND COULD NOT HAVE BEEN, URGED BELOW SINCE THEY ARE BASED ON A JURY VERDICT ENTERED AFTER DISMISSAL OF THE THIRD PARTY COMPLAINT

The arguments set forth by MGO in Points II, III and IV of its brief were not, and could not have been, urged below since they are based upon a jury verdict entered after the dismissal of the third-party complaint. The third-party complaint was dismissed while proof was being offered in Doralee's case against Cities Service, and prior to Cities Service's case against MGO. The dismissal was based on the law and not on any facts adduced. There were no findings of fact by the court or the jury. However, Points II, III and IV of the MGO brief now raise issues,for the first time, which are predicated on "the facts" or what MGO's appellate counsel now urges the facts to be.

MGO's Points II, III and IV are discussed hereafter, even though it is the position of Cities Service that they may not be considered on this appeal because they argue facts and considerations inherent in the evidence adduced (some after the dismissal) and the subsequent verdict, none of which was, or could have been, considered by, or urged upon, the court below.

The clear language of the indemnification agreement between MGO and Cities Service was that MGO agreed to indemnify Cities Service for damages caused by or due to "... the condition or use of the premises or the streets on which they abut." (E-105, ¶8). MGO argues that this indemnification does not extend to Cities Service because "a new, independent and superseding agreement" had been created and because Cities Service was not indemnified against breach of that stipulation of settlement. (MGO Br. at 14, et seq.). It is, however, obvious that no damage could have been caused to the Doralee premises by a mere breach of a stipulation of settlement. Rather, the damage must have arisen from the condition or use by MGO of the oil storage area. It was the testimony of Sam Greene, MGO's general manager, that only MGO operated the terminal facility. (A-437/8-20; A-435/3-5; A-436/25-A-437/3). The proof below was that the damage was caused by the usage of the MGO terminal by MGO and was not caused by structural deficiencies in the premises. The failure of the occupant,MGO, to keep the oil separator from clogging and overflowing is what caused the oil damage. (A-856/15-17).

MGO argues in Point III of its brief that Cities Service is not entitled to indemnification because liability could have been based only upon the intentional acts of Cities Service. This argument misses the point. Judge Owen dismissed Cities Service's third-party complaint against MGO on the

law (A-1106/24-A-1107/9), and not upon any facts thereafter embraced in the verdict. As mentioned above, the dismissal occurred at a time when Cities Service had not yet presented its case against MGO and the facts were not in issue. Nonetheless, the proof was undisputed and from MGO's own witness that only MGO had operated and used the premises.

MGO's brief (MGO Br. at 27) is misleading, therefore, because Cities Service has urged reversal in this appeal because Doralee failed not only to prove that Cities Service acted intentionally but also because it failed to prove that Cities Service acted at all. (MGO Br. at 27). It is again begging the question for MGO to argue that Cities Service could have been held liable only for its own "intentional" acts when no such proof had been adduced at the time MGO's dismissal motion was granted nor, indeed, to the end of the trial.

It is significant in relation to MGO's Point III to point out that in MGO's brief Judge Owen's charge to the jury is clearly mischaracterized. MGO's brief leaves the implication that the Court's charge on liability in this case required the jury to find that Cities Service's own acts directly resulted in oil spills eventually polluting Doralee's premises. Quite to the contrary, the court clearly charged that omissions, or even a mere awareness of a spillage caused by MGO, might form the basis of Cities Service's liability. In the context of this charge it was clear that the "intentional, affirmative"

conduct of which MGO speaks in its brief was solely MGO's. (A-1267/8-16; A-1268/4-20; A-1269/8 - 16; A-1270/18 - 22; A-1273/23 - A - 1274/9; A-1276/4 - 8; and A-1285/23 - A - 1286/21). The fact is that the Court allowed the jury to predicate liability upon Cities Service's "omissions" or its mere "awareness" of the conditions, chargeable to MGO, which resulted in damage to Doralee. Id.

The case of Humphries v. Consolidated Edison Co. of New York, 314 F. Supp. 1052 (S.D.N.Y. 1969), aff'd, 429 F. 2d 422 (2d Cir. 1970), cited by MGO for the proposition that ambiguous contracts should be construed against their draftsmen, is particularly inapplicable to the Point (Point III of the MGO brief) under discussion. There has been no prior claim in these proceedings by any party, at any time, that the indemnification agreement between MGO and Cities Service set forth in the 1969 lease is in the least ambiguous. Neither the Court below nor this Court has been or is being requested to clarify the indemnification agreement herein. Furthermore, the rule of law for which Humphries, supra, is cited is as elementary as it is irrelevant.

Another point MGO (Point IV of the MGO brief) has raised for the first time here is the argument that an indemnification agreement violates public policy if it covers the commission of "intentional, deliberate, malicious and illegal acts." (MGO Br. at 29). Again, MGO's argument begs the

question. The proof in this case was that "the commission" of the "acts" which resulted in harm to Doralee was by MGO. Thus, MGO proceeds upon an unfounded assumption - that Cities Service committed the described acts. Furthermore, the authorities cited by MGO are entirely inapposite to its argument. MGO argues in substance, that once one of the described acts (i.e., "intentional, deliberate, malicious and illegal acts") takes place that, a fortiori, any indemnification agreement is void. This reasoning is entirely wrong and MGO's own authorities say so. The indemnification here is a general one against liability arising from the use and operation of the premises. It does not contemplate illegal acts; the leasing itself was for a proper, lawful purpose.

Two of MGO's authorities stand for the proposition that a contractual provision expressly indemnifying another against his own illegal acts is void. See, 28 N.Y. Jur., Indemnity, §5 and Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N.Y. 313, 171 N.E. 75 (1930). However, where the indemnification is such that a given covered act only subsequently proves illegal, the indemnification is not void. As stated in the paragraph immediately following MGO's quotation from 28 New York Jurisprudence, Indemnity:

> On the other hand, where the parties do not and are not bound to know that the act is unlawful, the mere fact that an act not supposed to be illegal subsequently proves to be so does not render void a promise of indemnity against the consequences of its commission. It has been

> held that a promise to indemnify against a trespass is not illegal and void unless it appears that at the time of the promise the promisee knew that the act indemnified would constitute a trespass. In this connection, it has been suggested as a general rule that a bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act. Moreover, while one may not contract for indemnification for the consequences of a criminal or illegal act to occur in the future, one may make an agreement to be indemnified or to indemnify with respect to a crime or illegal act which occurred prior to the making of the agreement. (emphasis added).

28 N.Y. Jur., Indemnity, §5 at 13-14. This distinction is made even clearer in Municipal Metallic Bed Mfg. Corp. v. Dobbs, supra, a case relied upon by MGO, where the court stated, in reference to an indemnification against loss caused by "...[or] as a result of the existence of [a Federal City or State] restriction, ordinance or statute" that:

> A plaintiff cannot recover if he is compelled to predicate his cause of action on an illegal contract, and one may not indemnify another against the consequences of his illegal acts (Hart v. City Theatres Co., 215 N.Y. 322), but the covenant or guaranty of indemnity sued on is not an illegal contract and it may be enforced without any violation of law by the tenant. The fact that the lease may not be lawfully performed does not make the guaranty illegal. It stands on its own footing.

Id. at 317, 171 N.E. at 76.

Another MGO authority, Hart v. City Theatres Co., 215 N.Y. 322, 109 N.E. 497 (1915) wherein the New York Court of Appeals holds an indemnification agreement to be void because the contract was "on its face" illegal, further bolsters this distinction. MGO Br. at 30; Hart v. City Theatres Co., supra, 215 N.Y. at 330, 109 N.E. at 499. Neither the indemnification agreement herein nor the lease agreement of which it is a part was or is an "illegal contract on its face" - nor has MGO ever previously argued that it was.

Finally, a most important fact with regard to this MGO argument, is that MGO agreed in the 1969 lease agreement to comply with the Law. Thus the lease contains the following provision:

> Tenant agrees to comply with all laws, rules, regulations and requirements of all governmental authorities having jurisdiction thereof in respect to Tenant's use and occupation of the premises. Tenant's acceptance of possession hereunder shall constitute an acknowledgment of the good and tenantable condition of the premises on the date of commencement of possession hereunder.

(E-105, ¶5).

MGO also cites the case of Warren v. Hudson Pulp & Paper Corp., 477 F.2d 229 (2d Cir. 1973) in support of this Point IV in its brief. Once again MGO's argument - based upon Warren, supra - begs the question because it fails to address the fact that the proof indicates that Cities Service

did no acts. Thus, there was no conduct upon which to predicate liability.

In its decision in Warren v. Hudson Pulp & Paper Corp., supra, this court, in the very portion of that decision quoted in MGO's brief, held that an indemnity provision would be upheld in situations this court defined as negligent - one of those situations being where there was:

> Tolerance of a known dangerous condition which eventually causes injury is negligent where the party permitting the danger to continue violates a duty owed to the plaintiff. But its neglect is no more than negligence; it is not an intentional wrong. See e.g., Levine v. Shell Oil Co., supra.

477 F.2d at 235.

V

THE CLAIM IN POINT V OF MGO'S BRIEF THAT THE LEASE WAS AN UNCONCIONABLE "CONTRACT OF ADHESION" WAS NOT MADE BELOW, NOR WAS THERE ANY PROOF OF IT

For the first time in the instant litgation, MGO has raised, in Point V of its Brief, the unpleaded argument that the lease between MGO and Cities Service was an unconscionable contract of adhesion. In conclusory terms, MGO flatly states "... the evidence proves, as a matter of law, that the alleged contractual indemnification agreement was not a contract arrived at in 'an arm's length transaction.'" (MGO Br. p. 32).

Absolutely nothing in the record supports this totally baseless contention raised here for the first time.

The only "evidence" cited by MGO is that Cities Service's net worth was established to be $1.3 billion and that the lease "... was printed on Cities Service's own form ...." The fact that Cities Service has a large net worth, standing alone, as it does here is in no way probative of the allegation that "as a matter of law" the 1969 lease agreement was unconscionable and MGO's brief offers no authority to this effect. The lease bespeaks a document resulting from the give and take of negotiations and not a contract of adhesion. Negotiated changes appear in paragraphs two, thirteen, eighteen and nineteen of the relatively short, twenty-two paragraph lease. (E-104; E-108 and E-109). Riders were attached to the lease, fully modifying paragraphs one and six of the "form". (E-106 and E-107); Levine v. Shell Oil Co., 28 N.Y. 2d 205, 321, N.Y.S. 2d 81, 269 N.E. 2d 799 (1971) and Hogeland v. Sibley, Lindsay & Curr Co., - N.Y. 2d - (Ct. App. No. 240, decided 6/16/77) add nothing to MGO's argument. In neither case was there sufficient proof to find an unconscionable agreement or a contract of adhesion.[7]

7. Sam Greene, MGO's general manager, testified that the lease was a document left "strictly to our attorneys." (A-438/17-24). Mr. Grubbs did not object to introduction of the lease into evidence (A-438/7-14) except to protest that the indemnification clause contained therein was barred by N.Y.G.O.L., §5-321. (A-439/18 - A - 440/20).

CONCLUSION

The District Court's dismissal of Cities Service's third-party complaint for contractual and common law indemnification against MGO should be reversed with costs and disbursements to Cities Service.

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

JAMES LEVERICH, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 185 St Marks Place Staten Island, N.Y. 10301.

That on the 26 day of September, 1977, deponent personally served the within APPELLANT'S REPLY TO THE BRIEF OF MGO CORP. AND MONTICELLO GAS + OIL CO. INC. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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James Leverich

Sworn to before me this
26 day of September, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930506
Qualified in Queens County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

RICHARD WITHERS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1526 Webster Ave. Apt.B-3 Bronx, NY 10457.

That on the 26 day of September, 19 77, deponent personally served the within APPELLANTS REPLY TO THE BRIEF OF MGO CORP. AND MONTICELLO GAS & OIL CO. INC. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

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Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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